

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

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|----------------------|---|-------------------|
| RICHARD GALE ZLOMKE, |) | 4:05CV3215 |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | MEMORANDUM |
| |) | AND ORDER |
| ROBERT HOUSTON, |) | |
| |) | |
| Respondent. |) | |

This matter is before the court upon a “Notice of Appeal or Judicial Reconsideration” (filing 20), which seeks reconsideration of this court’s judgment denying the petitioner’s 28 U.S.C. § 2254 petition, and upon a Notice of Appeal to the Eighth Circuit Court of Appeals from this court’s judgment denying his 28 U.S.C. § 2254 petition (filing 21).

The motion for reconsideration is denied (filing 20).

The petitioner has already been permitted to proceed in forma pauperis (filing 5). Pursuant to FRAP 24(a)(3), a party who has already been permitted to proceed in forma pauperis “may proceed on appeal in forma pauperis without further authorization . . . unless the district court . . . certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis.” The petitioner is permitted to proceed on appeal in forma pauperis.

Before the petitioner can appeal this court’s decision denying his § 2254 petition, a certificate of appealability must issue. 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability may issue under 28 U.S.C. §2253 “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When a district court has rejected a constitutional claim on the merits in

the course of denying a § 2254 petition, “[t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong” in order to meet the standard contained in § 2253(c). Slack v. McDaniel, 120 S. Ct. 1595, 1604 (2000). In contrast, when a district court denies a § 2254 petition on procedural grounds without reaching the applicant’s underlying constitutional claims on the merits, a certificate of appealability should issue under § 2253(c) when “the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” Slack, 120 S.Ct. at 1604.

The court must either issue a certificate of appealability indicating which issues satisfy the required showing, or must state the reasons why such a certificate should not issue. Fed. R. App. P. 22(b). For the reasons set forth in this court’s memorandum and order denying the § 2254 motion (filing 18), the petitioner has not made a substantial showing of the denial of a constitutional right within the meaning of 28 U.S.C. § 2253(c).

Accordingly, the “Notice of Appeal or Judicial Reconsideration” (filing 20), pending in this court at the time the notice of appeal to the Eighth Circuit Court of Appeals was filed, is denied.

Accordingly,

IT IS ORDERED:

1. The motion for reconsideration (filing 20) is denied;
2. The petitioner is entitled to proceed on appeal in forma pauperis;

3. A certificate of appealability shall not issue in this action; and
4. The Clerk of the United States District Court for the District of Nebraska shall provide a copy of this order to the Eighth Circuit Court of Appeals.

DATED this 30th day of July, 2007.

BY THE COURT:

s/ Joseph F. Bataillon

Joseph F. Bataillon
Chief District Judge